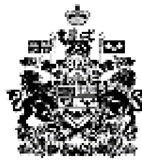

SUPREME COURT OF CANADA

CITATION: Northrop Grumman Overseas Services Corp. *v.* Canada (Attorney General), 2009 SCC 50

DATE: 20091105
DOCKET: 32752

BETWEEN:

Northrop Grumman Overseas Services Corporation
Appellant
and
Attorney General of Canada and Lockheed Martin Corporation
Respondents

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 48) Rothstein J. (McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Cromwell JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Northrop Grumman Overseas Services Corporation *Appellant*

v.

Attorney General of Canada and
Lockheed Martin Corporation *Respondents*

Indexed as: Northrop Grumman Overseas Services Corp. *v.* Canada (Attorney General)

Neutral citation: 2009 SCC 50.

File No.: 32752.

2009: May 19; 2009: November 5.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Commercial law — Trade agreements — Agreement on Internal Trade — Scope —

Non-Canadian supplier — Government procurement — Whether non-Canadian suppliers have standing to initiate procurement complaints before Canadian International Trade Tribunal under Agreement on Internal Trade — Meaning of expression "procurement within Canada" in Article 502 of Agreement.

Administrative law — Boards and Tribunals — Canadian International Trade Tribunal — Jurisdiction — Agreement on Internal Trade — Government procurement — Non-Canadian supplier bringing complaint before Canadian International Trade Tribunal with respect to award of procurement concerning military goods — Whether Tribunal has jurisdiction to hear complaint initiated by non-Canadian supplier under Agreement on Internal Trade — Agreement on Internal Trade, Article 502.

Public Works launched a request for proposals for the procurement of military goods. Northrop Overseas, a Delaware corporation wholly owned by another Delaware corporation, submitted a bid. When another bidder was awarded the contract, Northrop Overseas filed a complaint with the Canadian International Trade Tribunal ("CITT") alleging that Public Works had failed to evaluate the bids properly, violating Article 506(6) of the *Agreement on Internal Trade* ("AIT"). When the CITT agreed to hear the complaint, Public Works challenged Northrop Overseas' standing to file the complaint on the grounds that Northrop Overseas was not a "Canadian supplier". The CITT ruled that Northrop Overseas had standing to bring the complaint. On judicial review, the Federal Court of Appeal quashed the ruling, holding that the CITT's jurisdiction under the AIT was limited to complaints brought by Canadian suppliers.

Held: The appeal should be dismissed.

Non-Canadian suppliers do not have standing before the CITT to bring a complaints under the AIT. While the CITT may be an efficient dispute resolution vehicle, it is a statutory tribunal and access to it must be found in the relevant statutory instrument. The statutory provisions provide that access to the CITT is pursuant to specific trade agreements negotiated by governments. If the government of a supplier did not negotiate access to the CITT for its suppliers, there is no access for them. In this case, standing before the CITT is determined by the AIT. As a U.S. company with no office in Canada, Northrop Overseas is not a Canadian supplier and is within the jurisdiction of a government that did not negotiate access to the CITT for this type of contract. Its recourse is judicial review in the Federal Court. [1] [30] [44] [47]

The procurement provisions in Chapter Five of the AIT are incorporated in their entirety into the CITT's statutory scheme. Under the *Canadian International Trade Tribunal Act*, a "potential supplier" may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a "designated contract". In order to qualify as a "potential supplier", the bidder must be a bidder or prospective bidder on a designated contract. Section 3(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* further provides that a "designated contract" is one described in certain trade agreements, including the AIT. However, under the AIT, in order for a contract to be a "designated contract", the supplier must also be a "Canadian supplier". Otherwise the AIT is inapplicable to that contract. [11] [13] [16-17] [32]

The AIT is essentially a domestic free trade agreement. Article 101(1), which defines the scope of the AIT, provides that it applies to "trade within Canada" and Article 501 indicates that

Chapter Five of the AIT, which relates to procurement, establishes a framework that will ensure equal access to procurement for all Canadian suppliers. According to Article 518, only suppliers with an office in Canada qualify as Canadian suppliers. When read in context, "procurement within Canada" in Article 502 is a subset of the category of "trade within Canada" whereby the government acquires supplies. Under Article 502, the nationality of the "supplier" is necessary to determine whether the procurement at issue is "within Canada" and therefore covered by the AIT. This interpretation is consistent with the rest of Article 502 and with the French text of the AIT. Since the notion of "potential supplier" and the nationality of the supplier enter into consideration at different stages of the analysis for different purposes, it also avoids circularity. [11] [22] [24-26] [28-29] [34]

Granting non-Canadian suppliers standing to bring complaints based on the AIT to the CITT would lead to problematic results. In this case, Northrop Overseas would gain rights under the AIT despite its government not being a party to the AIT. This poses difficulties. The goods that were the subject of this procurement were specifically excluded from trade agreements signed with its country's government and allowing the complaint would undercut that exclusion and others like it in other international trade agreements. There would also be no reason for the CITT Regulations to refer to each specific trade agreement if anyone contracting with the Government of Canada or of a province of Canada had standing before the CITT solely on the basis of Article 502(1) of the AIT. [41] [43]

Cases Cited

Referred to: *Eurodata Support Services Inc. (Re)*, [2001] C.I.T.T. No. 59 (QL);

Winchester Division — Olin Corp. (Re), [2004] C.I.T.T. No. 44 (QL); *EFJohnson (Re)*, PR-2006-006, April 26, 2006; *Computer Label Worldwide Co. (Re)*, PR-2006-023, August 22, 2006; *Europe Displays, Inc. (Re)*, [2007] C.I.T.T. No. 2 (QL); *Canada (Attorney General) v. Symtron Systems Inc*., [1999] 2 F.C. 514; *E.H. Industries Ltd. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 48, 267 N.R. 173; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241, [2001] 1 F.C. 292; *Defence Construction (1951) Ltd. v. Zenix Engineering Ltd.*, 2008 FCA 109, 377 N.R. 47; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *UL Canada Inc. v. Québec (Procureur général)*, [1999] R.J.Q. 1720.

Statutes and Regulations Cited

Canadian International Trade Tribunal Act, R.S.C. 1985, c. 47 (4th Supp.), ss. 30.1 "complaint", "designated contract", "government institution", "interested party", "potential supplier", 30.11(1), 30.13(1).

Canadian International Trade Tribunal Procurement Inquiry Regulations, SOR/93-602, ss. 3(1), 7(1), 11.

Trade Agreements

Agreement on Government Procurement, Annex 4 of the *Marrakesh Agreement Establishing the World Trade Organization*, 1867 U.N.T.S. 3, Ann. 1.

Agreement on Internal Trade (1995), Preamble, Chapter One, arts. 100, 101, Chapter Five, arts. 501, 502, 504, 506, 513, 514, 518, Annex 502.1A.

Canada-Chile Free Trade Agreement, Ann. K*bis*-01.1-3, Schedule of Canada, Section A, rule 2, K*bis*-13.

Canada-Colombia Free Trade Agreement, art. 1412, Ann. 1401-3, Section B.

Canada-Peru Free Trade Agreement, art. 1412, Ann. 1401.1-3, Schedule of Canada, Section A, rule 2.

North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can. T.S. 1994 No. 2, Ann. 1001.1b-1.

Authors Cited

Bankes, Nigel. "Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991), 29 *Alta. L. Rev.* 792.

Swinton, Katherine. "Law, Politics, and the Enforcement of the Agreement on Internal Trade", in Michael J. Trebilcock and Daniel Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade*. Toronto: C.D. Howe Institute, 1995, 196.

APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Sexton and Ryer JJ.A.), 2008 FCA 187, [2009] 1 F.C.R. 688, 293 D.L.R. (4th) 335, 379 N.R. 1, [2008] F.C.J. No. 798 (QL), 2008 CarswellNat 1619, setting aside a decision of the Canadian International Trade Tribunal and remitting the matter back to it, [2007] C.I.T.T. No. 100 (QL), 2007 CarswellNat 3717. Appeal dismissed.

Barbara A. McIsaac, *Q.C.*, and *Patrick Veilleux*, for the appellant.

Anne M. Turley, *Christine Mohr* and *Alexander Gay*, for the respondent the Attorney General of Canada.

Richard A. Wagner and *G. Ian Clarke*, for the respondent the Lockheed Martin Corporation.

Appeal dismissed with costs.

The judgment of the Court was delivered by

ROTHSTEIN J. —

1. Introduction

[1] The issue in this case is whether a potential supplier for a government procurement that is not a Canadian supplier has standing before the Canadian International Trade Tribunal ("CITT") to bring a complaint alleging an unfair bidding process based on the *Agreement on Internal Trade* ("AIT"). In my opinion, it does not.

2. Facts

[2] Public Works and Government Services Canada ("PW") launched a request for proposals for the procurement of 36 advanced multi -role infrared sensor ("AMIRS") targeting pods

for the Department of National Defence's CF-18 aircraft and 13 years of in-service support for the pods. AMIRS pods are devices mounted on military aircraft in order to provide high resolution imagery identifying targets. The appellant, Northrop Grumman Overseas Services Corporation ("Northrop Overseas"), submitted a bid along with Lockheed Martin Corporation ("Lockheed") and Raytheon Company ("Raytheon"). Lockheed's bid was chosen, resulting in it being awarded a contract for US$89,487,521 for the AMIRS targeting pods and US$50,357,649 for the in-service support.

[3] Subsequent to the award of the procurement to Lockheed, Northrop Overseas filed a complaint with the Canadian International Trade Tribunal. It alleged that PW failed to evaluate bids submitted in response to the request for proposals in accordance with the Evaluation Plan, which sets out the procedures and methodology for evaluating the bids, including the score to be awarded for different aspects of each bid. Northrop Overseas alleges that it was not awarded points to which it was entitled and that Lockheed was awarded points to which it was not entitled under the Evaluation Plan. In so doing, Northrop Overseas argues that PW violated Article 506(6) of the AIT, which requires procurements covered by the AIT to clearly identify the criteria used to evaluate bids. The CITT agreed to hear the complaint.

[4] Northrop Overseas is incorporated in the state of Delaware and is wholly owned by Northrop Grumman Corporation ("Northrop Grumman"), another Delaware corporation. Northrop Grumman also owns a Canadian subsidiary, Northrop Grumman Canada (2004) Inc. ("Northrop Canada"). The bid, in this case, was made by Northrop Overseas.

[5] Before a hearing on the merits took place, PW challenged Northrop Overseas' s standing to file a complaint with the CITT based on a breach of the AIT. It alleged that Northrop Overseas was a U.S. company and not a "Canadian supplier". PW argued that access to the CITT through the AIT is restricted to Canadian suppliers (letter o f April 25, 2007).

[6] The CITT ruled that Northrop Overseas did have standing to bring a complaint based on the AIT ([2007] C.I.T.T. No. 100 (QL)). In coming to this ruling, the CITT broke with its previous decisions in which it held that only Canadian su ppliers could bring complaints based on the AIT: see *Eurodata Support Services Inc. (Re)*, [2001] C.I.T.T. No. 59 (QL); *Winchester Division—Olin Corp. (Re)*, [2004] C.I.T.T. No. 44 (QL); *EFJohnson (Re)*, PR-2006-006, April 26, 2006; *Computer Label Worldwide Co. (Re)*, PR-2006-023, August 22, 2006; *Europe Displays, Inc.(Re)*, [2007] C.I.T.T. No. 2 (QL).

[7] On judicial review, the majority of the Federal Court of Appeal quashed this ruling, determining that the CITT only had jurisdiction to hear complaints under t he AIT brought by Canadian suppliers (2008 FCA 187, [2009] 1 F.C.R. 688). It remitted the matter to the CITT for determination as to whether Northrop Overseas was a Canadian supplier.

[8] Northrop Overseas appeals to this Court to have the CITT's original ruling granting it standing before the CITT restored. Both PW and Lockheed defend the judgment of the majority of the Federal Court of Appeal.

3. Issue

[9] I take the appellant as identifying two main issues. First, did the CITT err in hold ing that non-Canadian suppliers have standing to initiate procurement complaints before the CITT under the AIT? If standing is not limited to Canadian suppliers, the second issue is whether the CITT erred in holding that Northrop Grumman's complaint discl oses a reasonable indication of a violation of Chapter Five of the AIT as required by s. 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, SOR/93-602 ("CITT Regulations"). Since I determine that standing is limited to Canadian suppliers under the AIT, I do not examine the second issue.

4. Analysis

A. *Standard of Review*

[10] As the Federal Court of Appeal and the parties noted, the case law has established that a CITT decision on whether something falls within its jurisdiction will be reviewed on a correctness standard: see *Canada (Attorney General) v. Symtron Systems Inc*., [1999] 2 F.C. 514 (C.A.), at para. 45; *E.H. Industries Ltd. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 48, 267 N.R. 173, at para. 5; *Siemens Westinghouse Inc. v. Canada (Minister of Public Works and Government Services)*, 2001 FCA 241, [2001] 1 F.C. 292, at para. 15, and *Defence Construction (1951) Ltd. v. Zenix Engineering Ltd.*, 2008 FCA 109, 377 N.R. 47, at para. 19. These are relatively recent cases which have determined the standard of review and all parties accept that they remain authoritative in relation to the standard of review applicable to the question to be answered in this appeal. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, recognized

that an exhaustive standard of review analysis is not required in ev ery case if the relevant standard of review jurisprudence has already determined *in a satisfactory manner* the degree of deference to be accorded with regard to a particular category of question: see paras. 54, 57 and 62. The approach to standard of review in *Dunsmuir* is intended to be practical. In this case, it is not necessary to go beyond the initial step in the *Dunsmuir* analysis. The issue on this appeal is jurisdictional in that it goes to whether the CITT can hear a complaint initiated by a non -Canadian supplier under the AIT. Accordingly, the standard of review is correctness.

B. *Standing*

(i) Interpretation

[11] The AIT is an inter-governmental agreement entered into by the executive of the federal, provincial and territorial (except Nunavut) governments. It is not a piece of legislation. The executive cannot displace existing laws by entering into agreements, though the agreements may bind it: see *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 433; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 551 -52. Of course, the legislature can choose to adopt an agreement, in whole or in part, and give i t the force of law: see *UL Canada Inc. v. Québec (Procureur général)*, [1999] R.J.Q. 1720, at p. 1741, citing Nigel Bankes, "Co -operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia" (1991), 29 *Alta. L. Rev.* 792, at p. 832. Indeed, parts of the AIT have been adopted by reference in legislation. Aside from the provisions discussed in this appeal, Chapter Five of the AIT, which relates to procurement, is incorporated in its entirety into the CITT's stat utory scheme by s. 11 of the

CITT Regulations.

[12] However, the fact that part of the AIT has been adopted in legislation should not obscure the fact that it was not drafted as legislation. As Katherine Swinton, now Justice Swinton of the Ontario Superior Court, has noted, the AIT is a political document. Many of its provisions express general principles or goals that are not directly enforceable. While, as Katherine Swinton notes, the AIT may be "written in legal language", PW rightly points out that it does not necessarily follow the conventions of legislative drafting: see "Law, Politics, and the Enforcement of the Agreement on Internal Trade", in M.J. Trebilcock and D. Schwanen, eds., *Getting There: An Assessment of the Agreement on Internal Trade* (1995), 196, at p. 201.

(ii) Standing Under the *Canadian International Trade Tribunal Act*

[13] Standing before the CITT for procurement complaints is governed by s. 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) ("CITT Act"), which provides that "a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint".

[14] Northrop Overseas says that pursuant to s. 30.11(1) of the CITT Act, the only requirement for standing is to be a "potential supplier" under a "designated contract". It submits that it was a potential supplier. It says that contrary to the decision of the Federal Court of Appeal, there is no requirement to be a "Canadian supplier" in order that the contract in question be a "designated

contract" in order to ground standing before the CITT.

[15] Indeed, that is the main issue in this appeal. Resolving it is a matter of statutory interpretation and interpretation of the AIT. The relevant provisions of the applicable legislation and the AIT are contained in the Appendix.

[16] Under s. 30.1 of the CITT Act, "potential supplier" is defined as "a bi dder or prospective bidder on a designated contract". A "designated contract" is defined as "a contract for the supply of goods or services" to a government institution and "that is designated or of a class of contracts designated by the regulations". Se ction 30.1 also provides that a "government institution" is "any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations".

[17] Section 3(1) of the CITT Regulations further provides that a "designated contract" is one described in the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 ("NAFTA"), the World Trade Organization *Agreement on Government Procurement*, 1867 U.N.T.S. 3 ("WTO-AGP"), or the AIT, and now, the *Canada-Chile Free Trade Agreement* ("CCFTA"). As Ryer J.A. put it at para. 85, those trade agreements

> may be regarded as "doors" into the jurisdiction of the CITT. A potential complainant in respect of a procurement may pass through a "door" and thereby gain access to the CITT complaint procedure, by demonstrating that the subject -matter of the procurement is within the scope of one of the trade agreements and that the activity contemplated by

that potential complainant is covered by, or within the scope of, that agreement.

[18] The agreements through which complainants can gain access to the CITT were each negotiated between different parties and confer different rights. It is not argued that either the NAFTA or the WTO-AGP are relevant. This is because Canada has negotiated the exclusion of the military procurement at issue in this case from the NAFTA and the WTO-AGP. In both the NAFTA and the WTO-AGP, military procurement is treated differently from many other categories of procurement. Whereas all procurements by certain federal government departments are covered by the rules in these agreements, for the Department of National Defence ("DND"), the only procurements covered by the NAFTA are those for the goods listed at its Annex 1001.1b-1. And the only procurement covered by the WTO-AGP are those listed in its Annex 1. In this case, the goods at issue, "Fire Control Systems", are not listed in either Annex 1001.1b-1 or Annex 1 and, therefore, neither the NAFTA nor the WTO-AGP apply to the procurement in this case. By contrast, the AIT applies to all procurement by PW or DND and so the goods at issue are not excluded from the AIT: see Annex 502.1A of the AIT.

(iii) The Scope of the AIT

[19] Northrop Overseas argues that the contract with PW for the supply of targeting pods for the CF-18 aircraft plus in-service support for 13 years is a contract described in Article 502 of the AIT. It says it is entitled to rely on the AIT.

[20] Article 502 of the AIT sets monetary thresholds for the application of the AIT.

There is no doubt that the contract in this case far exceeds those thresholds.

[21] Article 502(1) makes it clear that it applies to procurements by the federal, provincial or territorial (except Nunavut) governments. However , it does not specify expressly who may be a supplier in the case of procurements covered by the AIT. Article 502 uses the expression "procurement within Canada" by listed entities ("*marchés publics ... passés au Canada par une [des] entités énumérées*" in French), but it does not define "procurement within Canada". To understand what makes a procurement "within Canada", it is necessary to consider other provisions of the AIT that provide the context in which to understand Article 502.

[22] Article 501 sets forth the purposes of Chapter Five of the AIT: "... to establish a framework that will ensure equal access to procurement for all Canadian suppliers...." A "Canadian supplier" is defined in Article 518 as a supplier having "a place of business in Canada ".

[23] Further guidance is provided in the Preamble and in Articles 100 and 101 of the AIT. The AIT's Preamble states that the parties to the agreement have resolved to promote an "open, efficient and stable domestic market" and "equal economic opportunity for Canadians", as well as to reduce barriers to the free movement of "persons, goods, services and investments within Canada" (emphasis added). Article 100 provides that it is the obligation of the parties to eliminate barriers to free trade of persons, goods, services and investments within Canada and to establish an open and efficient and stable domestic market. Article 101(1) provides that the AIT applies to trade within Canada. Article 101(3) provides further elaboration to this end. Article 101(3) (a) says that the parties will not establish new barriers to *internal trade*. Article 101(3)(b) says that the parties will

treat all persons, goods, services and investments equally *irrespective of where they originate in Canada*. Paragraphs (c) and (d) require the parties to reconcile relevant standards and regulatory measures and administrative policies to provide for free movement of *trade within Canada*.

[24] It is abundantly clear having regard to these provisions of the AIT that the agreement pertains to domestic trade within Canada. Essentially, it is a domestic free trade agreement.

[25] These provisions assist in providing context within which to interpret the meaning of Article 502(1) of the AIT. As I understand Ryer J.A.'s reasons, he takes "procurement within Canada" to be a subset of the category of "trade within Canada", which defines the scope of the AIT at Article 101; "procurement within Canada" is that sub-category of "trade within Canada" whereby the government acquires supplies: see majority reasons at paras. 36-40 and 58. I think he is correct.

[26] This interpretation is consistent with the rest of Article 502. Article 502(3) allows certain entities to deviate from the AIT in their commercial procurement provided that they do not discriminate against suppliers of goods or services of any other *party*.

[27] The procurements within Canada referred to in Article 502(1) are procurements between a government entity of a party to the AIT and a supplier of another party. That is, when an entity of the federal government or a provincial or territorial government (except Nunavut) enters into a procurement contract with a supplier within the jurisdiction of the federal government or a

provincial or territorial government (except Nunavut) who are the parties to the AIT, the procuring party is to govern itself in accordance with the requirements of the AIT.

[28] According to Article 518, only suppliers with an office in Canada qualify as Canadian suppliers. This makes sense in light of the AIT being concerned with internal trade. As Ryer J.A. noted, a procurement contract with a foreign supplier would entail trading with a supplier not located in Canada — "the resulting transaction would more properly constitute 'international' trade, and not 'internal' Canadian trade or trade inside Canada" (para. 55).

[29] I do not think the interpretation that suppliers to procurement under the AIT have to be suppliers in Canada is inconsistent with the French text of the AIT. In his dissent, Létourneau J.A. expressed concern that the French version of Article 502(1) indicated that the AIT's procurement provisions applied "to a public deal or contract done in Canada which involves the Canadian government in this case" (para. 97). In French, Article 502(1) refers to "*marchés publics ... passés au Canada*". While, acontextually, the phrase "*marchés publics ... passés au Canada*" might be interpreted as procurement merely made or reached in Canada, the phrase must be read in light of the title, the Preamble and Chapter One's stipulation that the agreement applies to "internal trade" and "trade within Canada". In the context of the AIT's scope and purpose, I think it is fair to say that in order for a procurement contract to be "*passés au Canada*", the supplier must be Canadian, as defined in Article 518.

(iv) <u>The Relationship Between Suppliers and the Parties to a Trade Agreement in the Scheme of the CITT Regulations</u>

[30] This appeal proceeds on the basis that Northrop Overseas does not have a place of business in Canada. On this basis, Northrop Overseas is not a Canadian supplier because it does not have a place of business within the jurisdiction of a government that is a party to the AIT and it is not entitled to invoke the provisions of the AIT in order to have standing before the CITT.

[31] In other words, a designated contract, under the scheme of s. 3(1) of the CITT Regulations, is one for procurement by a government or government entity under either the NAFTA, the AIT, the WTO-AGP, or, now, the CCFTA. The placement of the AIT alongside other trade agreements in s. 3(1) is instructive. These agreements operate on the basis of a mutual lowering of trade barriers for the parties to each agreement. Canada negotiated access for its citizens to markets in other countries in exchange for lowering Canadian barriers to commerce from these same countries. The agreements confer rights on the parties to them and to suppliers of those parties.

[32] In the case of the AIT, in order for the contract to be a designated contract, the supplier must be a Canadian supplier in a procurement contract by a Canadian government or government entity. Otherwise the AIT is inapplicable to that contract.

(v) <u>Circularity</u>

[33] Létourneau J.A. was of the view that PW's argument is circular, stating that

> ... a potential supplier, according to section 30.1 of the CITT Act, is "a bidder or prospective bidder on a designated contract." And a designated contract is one that takes into account particular circumstances or characteristics of the potential supplier. In other words, a potential supplier is defined by the designated contract and a designated contract is defined by the potential supplier. [para. 102]

I am unable to agree with this characterization because, in my view, it conflates the notion of "potential supplier" in ss. 30.1 and 30.11 of the CITT Act with the notion of "supplier" in Article 502 of the AIT. These are, in my respectful view, two different concepts that are used in two different ways.

[34] Under Article 502 of the AIT, the nationality of the "supplier" is necessary to determine whether the procurement at issue is "within Canada" and therefore covered by the AIT. By contrast, the notion of "potential supplier" defined at s. 30.1 of the CITT Act is used, at s. 30.11, to determine whether the complainant has standing before the CITT under a relevant listed trade agreement. The term "potential supplier" in the CITT Act is general and intended to apply to all the trade agreements listed in s. 3(1) of the CITT Regulations. While these determinations may overlap to some extent, the notion of "potential supplier" and the nationality of the supplier enter into consideration at different stages of the analysis for different purposes. There is therefore no circularity.

(vi) Other Provisions of the AIT

[35] Northrop Overseas points to a number of other provisions of Chapter Five of the AIT as supporting its argument that the AIT confers rights to it. These arguments are made with respect to the second issue, namely, whether Northrop Overseas's complaint discloses a reasonable indication of a violation of the AIT in accordance with s. 7(1) of the CITT Regulations. I do not address this issue because I have found that non-Canadian suppliers do not have standing before the

CITT. Nevertheless, I think it is useful to address some of Northrop Overseas's arguments in that they might be thought to have a bearing on the interpretation of Article 502 of the AIT.

[36] Northrop Overseas says that Article 514 provides for federal bid protest procedures (i.e., the CITT) that are available to all suppliers on a procurement by a designated entity. It points to the distinction between "suppliers" and "Canadian suppliers" in the definitions at Article 518 of the AIT to argue that where the AIT refers only to "suppliers", as in Article 514, it includes non-Canadian suppliers. That interpretation would mean that, in this case, Northrop Overseas, a non-Canadian supplier, would be entitled to file a complaint before the CITT. I do not think this interpretation can stand. The AIT does not distinguish between "Canadian suppliers" and "suppliers" in the way Northrop Overseas suggests. Although Articles 513(2-6) refer only to "suppliers", Articles 513(4-6) assume that the supplier will be located in a province. For example, Article 513(4) provides that "a supplier ... may make a written request to the contact point in the Province where the supplier is located to seek resolution of the complaint".

[37] The fact that the AIT does not specify that the provincial bid protest procedures set out in Article 513 are limited to Canadian suppliers, while clearly assuming it, suggests that references to "suppliers" in Article 514, which sets out the federal bid protest procedures, are also meant to apply only to Canadian suppliers.

[38] Article 504(6) (and perhaps Article 504(5)) do use "supplier" so as to include non-Canadian suppliers. Other provisions of Article 504 use "supplier" (and not "Canadian supplier") to refer to suppliers from Canada: Article 504(1) refers to "suppliers ... of any other

Party", Articles 504(2) and (4) refer to "suppliers ... of a particular Province or region", and Article 504(3) assumes suppliers will have a "place of business in Canada". However, Ar ticle 504(6) provides:

> Except as otherwise required to comply with international obligations , a Party may limit its tendering to Canadian goods, Canadian services or Canadian suppliers, subject to the following conditions:
>
> (a) the procuring Party must be satisfied that there is sufficient competition among Canadian suppliers;
>
> (b) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable t o determine Canadian content; and
>
> (c) the requirement for Canadian content must be no greater than necessary to qualify the procured good or service as a Canadian good or service. [Emphasis added.]

A number of interpretations of this provision have been advanced. Northrop Overseas argues that it must be intended to benefit non -Canadian suppliers. Otherwise it creates "a right for which there is no beneficiary" (Northrop Overseas's factum, at para. 93).

[39] I do not think this is the correct way to read A rticle 504(6). The opening words of the provision recognize that the AIT will not trump international obligations pertaining to the nationality of goods, services or suppliers of a procurement process. It does not recognize any obligations to foreign sup pliers, unless those obligations are required by international agreements or law. Otherwise, the obligations recognized in the AIT are to other government parties and the suppliers of those parties. The conditions under which a procurement may be limited to Canadian goods, services or suppliers in Article 504(6) ensure that the taxpayers funding the procurement are receiving the benefits of a substantively competitive process. It does not bring foreign suppliers

under the AIT.

[40] Northrop Overseas also argues that Article 506, on which it based its complaint, confers rights to all suppliers rather than just Canadian suppliers. However, as Ryer J.A. notes, Article 506(1) stipulates that procedures set out in Article 506 apply to the "procurements that are covered by Chapter Five" (para. 45). That, in turn, is determined by Article 502. I do not think that Article 506 is therefore helpful in interpreting Article 502 or the scope of the AIT. As I have stated, Chapter Five applies only to procurements between listed entities and Canadian suppliers.

(vii) Problems with the AIT Applying to Non-Canadian Suppliers

[41] Northrop Overseas' argument that non-Canadian suppliers have standing to bring complaints based on the AIT to the CITT leads to problematic results. If the argument of Northrop Overseas were correct, it would gain rights under the AIT despite its government (here, the U. S.) not being a party to the AIT. This poses difficulties. First, the goods that were the subject of this procurement were excluded from the NAFTA and the WTO-AGP. Allowing non-Canadian suppliers to gain rights under the AIT where those rights were specifically excluded from agreements signed with their country's government would undercut the exclusion. Canada has negotiated similar exclusions for the military goods at issue in this case in trade agreements with Chile, Colombia and Peru: see CCFTA, Annex K*bis*-01.1-3, Schedule of Canada, Section A, rule 2; *Canada-Peru Free Trade Agreement*, Annex 1401.1-3, Schedule of Canada, Section A, rule 2; *Canada-Colombia Free Trade Agreement*, Annex 1401-3, Section B.

[42] Second, Northrop Overseas's interpretation undermines the Canadian government's approach to negotiating trade agreements. Access to an accelerated alternative dispute resolution body for procurement disputes, such as the CITT, is a concession that Canada can offer other countries in negotiating trade agreements with the intent of obtaining reciprocal concessions in the other country. If access to the CITT were freely available to suppliers of all countries, access to it would have no value as a concession and Canada would have greater difficulty securing the equivalent access for its own suppliers in foreign countries. Canada's trade agreements with Chile, Peru and Colombia also provide for timely dispute resolution of the sort provided by the CITT and, as noted above, the CCFTA has been added to s. 3(1) of the CITT Regulations: see CCFTA, Annex K*bis*-13, *Canada-Peru Free Trade Agreement*, Article 1412 and *Canada-Colombia Free Trade Agreement*, Article 1412.

[43] There would be no reason for the CITT Regulations to refer to each specific trade agreement if anyone contracting with a government institution had standing before the CITT solely on the basis of Article 502(1) of the AIT.

(viii) The Jurisdictions of the CITT and the Federal Court

[44] It is suggested that the CITT provides an efficient dispute resolution mechanism to which there should be ready access. While the CITT may be an efficient dispute resolution vehicle, it is a statutory tribunal and access to it must be found in the relevant statutory instrument. The statutory provisions provide that access to the CITT is pursuant to specific trade agreements negotiated by governments. If the government of a supplier did not negotiate access to the CITT for

its suppliers, there is no access for them.

[45] Northrop Overseas says that such an interpretation produces anomalous results. A Canadian supplier would have standing to challenge a contract awarded to a non-Canadian supplier but the reverse would not be true. Again, this is the result of the agreements negotiated by the governments who are parties to the various agreements under which the terms of access to the CITT are determined.

[46] It should be noted that a non-Canadian supplier of goods is not without recourse. Decisions of governments and government entities are subject to judicial review. In the case of the Government of Canada and its entities and, in particular, PW, there is recourse to the Federal Court by way of judicial review. It is argued that such recourse is limited and duplicative by comparison to that available through the CITT. While that may be so, again, access to the CITT is the product of the trade agreements entered into between the governments who are parties to such agreements and the legislation adopted to implement those agreements. The rights of suppliers are subject to the rights negotiated for them by their governments.

[47] Northrop Canada apparently has a place of business in Canada and if it, instead of Northrop Overseas, had bid on the procurement in this case, then, as the potential supplier in this case, it may well have had standing to complain about the award to Lockheed before the CITT. The majority of the Federal Court of Appeal suggested that income tax considerations may have been the reason Northrop Overseas was the potential supplier (para. 64). Whatever the reason, standing before the CITT is determined by the agreements entered into by the governments of suppliers. As

Northrop Overseas is within the jurisdiction of a government that did not negotiate access to the CITT for this type of military procurement by the Government of Canada, its recourse is judicial review in the Federal Court.

5. Disposition

[48] I would dismiss the appeal with costs.

APPENDIX

Canadian International Trade Tribunal Act, R.S.C. 1985, c. 47 (4th Supp.)

30.1 [Definitions] In this section and in sections 30.11 to 30.19,

"complaint" means a complaint filed with the Tribunal under subsection 30.11(1);

"designated contract" means a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations;

"government institution" means any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations;

"interested party" means a potential supplier or any person who has a material and direct interest in any matter that is the subject of a c omplaint;

"potential supplier" means, subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.

. . .

30.11 (1) [Filing of complaint] Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.

. . .

30.13 (1) [Decision to conduct inquiry] Subject to the regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2), it shall decide whether to conduct an inquiry into the complaint, which inquiry may include a hearing.

. . .

Canadian International Trade Tribunal Procurement Inquiry Regulations, SOR/93-602

3. (1) [Designations] For the purposes of the definition "designated contract" in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade, in Article I of the Agreement on Government Procurement or in Article K*bis*-01 of Chapter K*bis* of the CCFTA, by a government institution, is a designated contract.

. . .

7(1) [Conditions for inquiry] The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint:

(*a*) the complainant is a potential supplier;

(*b*) the complaint is in respect of a designated contract; and

(*c*) the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade, the Agreement on Government Procurement or Chapter *Kbis* of the CCFTA applies.

Agreement on Internal Trade

PREAMBLE

The Governments of Canada, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, the Northwest Territories and Yukon,

RESOLVED to:

PROMOTE an open, efficient and stable domestic market for long-term job creation,

economic growth and stability;

REDUCE AND ELIMINATE, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada;

PROMOTE equal economic opportunity for Canadians;

ENHANCE the competitiveness of Canadian business;

PROMOTE sustainable and environmentally sound development;

CONSULT on matters related to internal trade;

RECOGNIZE the diverse social, cultural and economic characteristics of the provinces; and

RESPECT the legislative authorities of Parliament and the provincial legislatures under the Constitution of Canada;

HEREBY AGREE as follows:

PART I

GENERAL

Chapter One

Operating Principles

Article 100: Objective

It is the objective of the Parties to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada and to establish an open, efficient and stable domestic market. All Parties recognize and agree that enhancing trade and mobility within Canada would contribute to the attainment of this goal.

Article 101: Mutually Agreed Principles

1. This Agreement applies to trade within Canada in accordance with the chapters of this Agreement.

. . .

3. In the application of this Agreement, the Parties shall be guided by the following

principles:

(a) Parties will not establish new barriers to internal trade and will facilitate the cross-boundary movement of persons, goods, services and investments within Canada;

(b) Parties will treat persons, goods, services and investments equally, irrespective of where they originate in Canada;

(c) Parties will reconcile relevant standards and regulatory measures to provide for the free movement of persons, goods, services and inv estments within Canada; and

(d) Parties will ensure that their administrative policies operate to provide for the free movement of persons, goods, services and investments within Canada.

4. In applying the principles set out in paragraph 3 , the Parties recognize:

(a) the need for full disclosure of information, legislation, regulations, policies and practices that have the potential to impede an open, efficient and stable domestic market;

(b) the need for exceptions and transition periods ;

(c) the need for exceptions required to meet regional development objectives in Canada;

(d) the need for supporting administrative, dispute settlement and compliance mechanisms that are accessible, timely, credible and effective; and

(e) the need to take into account the importance of environmental objectives, consumer protection and labour standards.

. . .

Article 501: Purpose

Consistent with the principles set out in Article 101(3) (Mutually Agreed Principles) and the statement of the ir application set out in Article 101(4), the purpose of this Chapter is to establish a framework that will ensure equal access to procurement for all Canadian suppliers in order to contribute to a reduction in purchasing costs and the development of a str ong economy in a context of transparency and efficiency.

Article 502: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to procurement within Canada by any of its entities listed in Annex 502.1A, where the procurement value is:

(a) $25,000 or greater, in cases where the largest portion of the procurement is for goods;

. . .

3. The entities listed in Annex 502.2B shall be free to pursue commercial procurement practices that may otherwise not comply with this Chapter. Nevertheless, the Parties shall not direct those entities to discriminate against the goods, services or suppli ers of goods or services of any Party, including those related to construction.

. . .

Article 504: Reciprocal Non-Discrimination

1. Subject to Article 404 (Legitimate Objectives), with respect to measures covered by this Chapter, each Party shall accord to:

(a) the goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own such goods and services; and

(b) the suppliers of goods and services of any other Party, including those goods and services included in construction contracts, treatment no less favourable than the best treatment it accords to its own suppliers of such goods and services.

2. With respect to the Federal Government, paragraph 1 means that, subject to Article 404 (Legitimate Objectives), it shall not discriminate:

(a) between the goods or services of a particular Province or region, including those goods and services included in construction contracts, and those of any other Province or region; or

(b) between the suppliers of such goods or services of a particular Province or region and those of any other Province or region.

3. Except as otherwise provided in this Chapter, m easures that are inconsistent with paragraphs 1 and 2 include, but are not limited to, the following:

(a) the imposition of conditions on the invitation to tender, registration requirements or qualification procedures that are based on the location of a s upplier's place of business in Canada, the place in Canada where the goods are produced or the services are provided, or other like criteria;

. . .

4. No Party shall impose or consider, in the evaluation of bids or the award of contracts, local content or other economic benefits criteria that are designed to favour:

(a) the goods and services of a particular Province or region, including those goods and services included in construction contracts; or

(b) the suppliers of a particular Province or region of such goods or services.

5. Except as otherwise required to comply with international obligations, a Party may accord a preference for Canadian value-added, subject to the following conditions:

(a) the preference for Canadian value-added must be no greater than 10 per cent;

(b) the Party shall specify in the call for tenders the level of preference to be used in the evaluation of the bid; and

(c) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine the Canadian value-added.

6. Except as otherwise required to comply with international obligations, a Party may limit its tendering to Canadian goods, Canadian services or Canadian suppliers, subject to the following conditions:

(a) the procuring Party must be satisfied that there is sufficient competition among Canadian suppliers;

(b) all qualified suppliers must be informed through the call for tenders of the existence of the preference and the rules applicable to determine Canadian content; and

(c) the requirement for Canadian content must be no greater than necessary to qualify the procured good or service as a Canadian good or service.

. . .

Article 506: Procedures for Procurement

. . .

6. In evaluating tenders, a Party may take into account not only the submitted price but also quality, quantity, transition costs, delivery, servicing, the capacity of the supplier to meet the requirements of the procurement and any other criteria directly related to the procurement that are consistent with Article 504. The tender documents shall clearly

identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

. . .

Article 513: Bid Protest Procedures – Provinces

1. This Article applies to complaints regarding procurement by Provinces.

2. Where, in respect of a specific procurement, a supplier has had recourse to the dispute settlement procedures under another procurement agreement, it may not utilize the bid protest procedures of this Chapter for that specific procurement.

3. The supplier shall communicate its concerns or complaints in writing to the procuring Party with a view to resolving them.

4. Where a supplier has exhausted all reasonable means of recourse with respect to a complaint with the procuring Party, it may make a written request to the contact point in the Province where the supplier is located to seek resolution of the complaint.

5. Where the contact point determines that the complaint is reasonable, it shall, on behalf of the supplier, within 20 days after the date of delivery of the request, approach the contact point of the procuring Party and make representations on the supplier's behalf. Where the contact point determines that the complaint is unreasonable, it shall provide a written notice to the supplier within 20 days after the date of delivery of the request setting out reasons for the decision. Failure to provide such notice is deemed to be notice for the purposes of Article 1711(2)(a) (Initiation of Proceedings by Persons).

6. Where the matter has not been resolved under paragraph 5 within 20 days after the date of delivery of the supplier's request, the Party in whose territory the supplier is located may make a written request for consideration of the complaint by a review panel. The request shall be delivered to the procuring Party and to the Secretariat. Where the Party in whose territory the supplier is located determines the complaint to be unreasonable, it shall provide written notice to the person within 20 days after the date of delivery of the supplier's request. Failure to provide such notice is deemed to be notice for the purposes of Article 1711(2)(b) (Initiation of Proceedings by Persons).

. . .

Article 514: Bid Protest Procedures – Federal Government

1. This Article applies to complaints regarding procurement by the Federal Government.

2. In order to promote fair, open and impartial procurement procedures, the Federal Government shall adopt and maintain bid protest procedures for procurement covered by this Chapter that:

(a) allow suppliers to submit bid protests concerning any aspect of the procurement process, which for the purposes of this Article begins after an entity has decided on its procurement requirement and continues through to the awarding of the contract;

(b) encourage suppliers to seek a resolution of any complaint with the entity concerned prior to initiating a bid protest;

(c) ensure that its entities accord fair and timely consideration to any complaint regarding procurement covered by this Chapter;

(d) limit the period within which a supplier may initiate a bid protest, provided that the period is at least 10 business days from the time when the basis of the complaint became known or reasonably should have become known to the supplier;

(e) permit a supplier that does not achieve a successful resolution of its complaint to bring the matter to the attention of an authority, with no substantial interest in the outcome, to receive and consider the complaint and make appropriate findings and recommendations with respect to the complaint;

(f) require the reviewing authority to provide its findings and recommendations in writing and in a timely manner and make them available to the Parties; and

(g) require the reviewing authority to specify its bid protest procedures in writing and make them generally available.

. . .

Article 518: Definitions

In this Chapter:

. . .

Canadian supplier means a supplier that has a place of business in Canada;

. . .

place of business means an establishment where a supplier conducts activities on a permanent basis that is clearly identified by name and accessible during normal working hours;

. . .

supplier means a person who, based on an assessment of that person's financial, technical and commercial capacity, is capable of fulfilling the requirements of a procurement and includes a person who submits a tender for the purpose of obtaining a construction procurement;

tender means a response to a call for tenders;

Solicitors for the appellant: Borden Ladner Gervais, Ottawa.

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitors for the respondent the Lockheed Martin Corporation: Ogilvy Renault, Ottawa.